In this case, paragraph (b) of clause 5 relieves the defendant "of all liability for damage arising out of collision ..." but does not go further to define the cause of collision; in particular the clause does not say after the word "collision", "howsoever caused". Though the words "all liability", are wide, they are limited by the causes that follow: "arising out of collision, upset, ...". Immediately following is paragraph (c) which expressly covers, *inter alia,* instances of negligence: see instances in sub-paragraphs (v) and (vi) of paragraph (c). Paragraph (b) also spells out causes or origins for loss or damage not relating to negligence in respect of which the hirer could be held liable. In my opinion, the two paragraphs must be so construed as to give sense and effect to each, and the cause of damage, "collision", in paragraph (b) must be reconciled with the cause of damage in paragraph (c)(vi), namely: "collision ... caused by negligent operation of the said vehicle under the control of hirer, ...". In so far as collision is concerned, paragraph (b) applies to relieve the hirer of all liability arising from collision not caused by negligence of the hirer, and paragraph (c)(vi) applies and imposes a liability on the hirer for damage arising from collision caused by the negligent operation of the vehicle under the control of the hirer.

Mr. Liew further relied on the case of *Price & Co.* v. *The Union Lighterage Co.*[3] There, the goods were loaded on the barge under a contract for carriage and the contract contained the clause exempting the barge owner from liability "for any loss or damage to goods which can be covered by insurance". The barge sank owing to the negligence of the servants of the barge owner and the goods were lost. The court held that the "exemption" being in general terms not expressly relating to negligence, the barge owner was not exempted from liability for loss of damage caused by negligence.

At the conclusion of the trial, I ordered that interlocutory judgment be given for the plaintiffs because Mr. Abdullah appeared to me to have misunderstood the position relating to admission of the bundle of documents. I noted from his written submission that he was disputing the quantum, and on being questioned, he said he did not accept the bundle of documents as an agreed bundle in the full sense but he agreed to their admission as formal documents with liberty to challenge the contents. For this reason, I decided that interlocutory judgment be entered and ordered that damages be assessed, which should then give the defendant a chance to dispute the quantum.

*Order accordingly,*

Solicitors: *R.C.H. Lim & Co.; Murphy & Dunbar.*

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## N.M. ROTHSCHILD & SONS (SINGAPORE) LTD. & 5 ORS. v. RUMAH NANAS RUBBER ESTATES SDN. BHD.

[O.C.J. (Thean J.) 29 February 1988]

[Singapore – Appeal in Suit No. 5830 of 1986]

*Contract – Guarantee – Claim under the guarantee.*

The plaintiffs and Oversea-Chinese Banking Corporation Limited granted certain loan facilities to one Freelin Investment Pte. Ltd. The defendants were one of the guarantors under the loan agreement. In the present case, the plaintiffs sought the amounts due under the guarantee. Summary judgment was obtained by the plaintiffs. The defendants appealed. The defendants raised various issues.

**Held**: none of the defences raised on behalf of the defendants constituted a triable issue.

*Case referred to:*

(1) *Public Prosecutor* v. *Tan Koon Swan* [1987] 1 M.L.J. 18 (refd).

CIVIL SUIT.

*Davinder Singh* for the plaintiffs.

*C.S. Wu* (*Eugene Lim* with him) for the defendants.

*Cur. Adv. Vult.*

**Thean J.**: On 1 August 1986, a company called Freelin Investment Pte. Ltd. ("Freelin") entered into three agreements ("option agreements") with three stockbrokers respectively, namely: E.G. Tan & Co. (Pte.) (in liquidation), J. Ballas & Co. (Pte.) Ltd. and Ong & Co. Pte. Ltd., whereby Freelin granted to them "an option" (which in effect is a right) to require Freelin to purchase from them *in toto* the following securities, namely, (i) 16,913,000 shares of M$1 each in Grand United Holdings Berhad ("Grand United"), (ii) 5,938,000

shares of M$1 each in Supreme Corporation Berhad ("Supreme") at the prices and on the terms and conditions therein respectively provided. Immediately thereafter, on 4 August 1986, Freelin entered into a syndicated credit facilities agreement ("the agreement") with the plaintiffs and Oversea-Chinese Banking Corporation Limited, whereby the second, third, fourth, fifth and sixth plaintiffs and the said bank (collectively called "the banks") agreed to grant to Freelin facilities in aggregate up to an amount of $13,710,600 for the purpose of enabling Freelin to purchase all those shares comprised in the option agreements ("option securities"). Under the agreement the liabilities of Freelin are secured, *inter alia,* by six guarantees – one by the defendants and five by five individuals – and each guarantee is expressed to guarantee a fixed percentage of the total sum due or owing by Freelin to the second, third, fourth, fifth and sixth plaintiffs. All the six guarantees are in identical forms, except for the percentage of the amount guaranteed and other necessary modifications. The defendants' guarantee was dated 4 August 1986 ("the guarantee") and was executed under seal, under which the defendants guaranteed the payment to the plaintiffs of an amount therein called the "guaranteed amounts", which is defined to mean "22.73% of all sums (whether principal, interest, fee or otherwise) whatsoever which are or at any time may be or become due or owing" by Freelin to the first plaintiff and/or the second, third, fourth, fifth and sixth plaintiffs under or in connection with the agreement.

The agreement, like most syndicated loan or facility agreements, is extremely lengthy and verbose, but the scheme of the facilities provided thereby is simple and straightforward. It is as follows:

(a) The facilities comprise (i) a guarantee facility and (ii) a loan facility. Under the guarantee facility, the banks agreed at the request of Freelin to issue to the three stockbrokers three bank guarantees respectively for the amounts as follows: the amount in favour of E.G. Tan & Company (Pte.) Ltd. (in liquidation) ("E.G. Tan") is $6,300,000; the amount in favour of J. Ballas & Company Pte. Ltd. ("J. Ballas") is $4,513,800 and the amount in favour of Ong & Company Private Limited ("Ong & Co.") is $2,896.800 – see clause 4(i) and schedule 3 of the agreement.

(b) As and when the stockbrokers exercise their rights under the respective option agreements, Freelin would be obliged to purchase the option securities at the price and on the terms and conditions therein stated, failing which, the stockbrokers would be entitled to call upon the banks to pay under the respective bank guarantees: see copies of the bank guarantees exhibited as "CKC 1" in the affidavit of Chee Kow Chai affirmed on 16 March 1987.

(c) As and when the banks pay under the respective bank guarantees, they would receive the option securities comprised in the respective option agreements, which option securities would then be charged to the banks as securities.

(d) Having made the payments to the stockbrokers pursuant to the bank guarantees, the banks would be entitled to call upon Freelin to reimburse them of the amounts on a certain date – called the reimbursement date – and upon such call being made, Freelin would come under an obligation to pay to the bank the amounts on the reimbursement date: see clauses 5(B) and 5(C) of the agreement. Freelin, if the facilities under the agreement have not been terminated, may request the banks to make loans or advances on the reimbursement date to reimburse the banks the amounts which have been paid under the respective bank guarantees: see clause 6 of the agreement. In other words, Freelin would then avail themselves of the loan facility under the agreement and convert their liability to the banks under the bank guarantees into a loan.

(e) If any of the events specified in clause 16(A) of the agreement occurs, the first plaintiff may by notice to Freelin declare that an event of default has occurred and may further make a declaration under clause 16(B), thereby accelerating the payment obligations of Freelin. In such an event, the second, third, fourth, fifth and sixth plaintiffs would be entitled, *inter alia,* to call upon the various guarantors, who have issued the guarantees to them pursuant to the agreement, to pay the respective amounts they guaranteed.

As I have said, the agreement and the guarantee were executed by the parties concerned on 4 August 1986. Thereafter, at the request of Freelin made in writing dated 20 August 1986, the three bank guarantees, all dated 22 August 1986, were executed and issued by the banks to the three stockbrokers respectively. Four days later, on 26

August 1986, an event occurred, which had far-reaching consequences on the transactions entered into by the parties. The person who played a pivotal role in these transactions was one Tan Koon Swan ("TKS") who, amongst other things, was a director of the two companies, Grand United and Supreme and was also one of the two directors of Freelin. At the material time when these transactions were being negotiated, he was facing a criminal charge for abetting one Tan Kok Liang in committing a breach of trust punishable under section 109 read with section 406 of the Penal Code. On that day, that is, 26 August 1986, he pleaded guilty to the offence charged before the High Court and was convicted and sentenced to a term of imprisonment for two years and was fined $500,000: see *Public Prosecutor* v. *Tan Koon Swan.*[1] It seems to me that such an event was not beyond the contemplation of the parties concerned in the negotiations leading to the execution of the agreement and the guarantee, as one of the events specified in clause 16(A) of the agreement (to which I shall advert shortly) is the event of TKS being placed under custody.

Following the conviction and sentence of TKS, all the six guarantors who had executed and issued guarantees to the plaintiffs under the agreement, for some strange and inexplicable reasons, gave notices in writing to the first plaintiff stating that they terminated their respective guarantees with immediate effect and that they would not be "liable for any sum which may be incurred" after the date of the notices. To my mind, these notices were wholly misconceived. Nowhere in the guarantees was it provided that the guarantors would be entitled "to terminate" their respective guarantees. As for their liabilities under the guarantees, they had already arisen: the banks had on 22 August 1986 issued the three bank guarantees to the stockbrokers respectively and Freelin had become liable to indemnify the banks in respect of the bank guarantees; so also had arisen the liabilities of the guarantors under the respective guarantees.

On 15 October 1986, Messrs. Drew & Napier, solicitors for the banks and the first plaintiff, gave notice to Freelin declaring that an event of default under the agreement had occurred by reason of one or more of the following events, namely: (i) that TKS had been placed under custody; (ii) that the guarantors had by notice claimed that the guarantees executed by them had ceased to be their legal and valid obligation binding upon each of them in accordance with the terms of the guarantees; and (iii) that the notices of the guarantors, in the opinion of the majority banks (as defined in the agreement), gave reasonable grounds for believing that the guarantors may not perform or comply with any one or more of their obligations under the respective guarantees. That notice further declared that the facilities had been cancelled and required Freelin to pay to the first plaintiff for credit to the cash collateral account a sum equal to the total guarantee outstandings, *i.e.* $13,710,600. Soon after this letter, J. Ballas called upon the banks to honour the bank guarantee given to it, and in response, the banks paid to J. Ballas a sum of $4,513,800 for 7,523,000 shares of Grand United on or about 22 October 1986.

On 1 December 1986, the plaintiffs initiated the present action against the defendants claiming for the sum of $2,434,519.38, being the guaranteed amounts under the guarantee and interest thereon as provided in the guarantee. On 19 December 1986, the plaintiffs took out an application for summary judgment which was heard by the Registrar on 3 June 1987 and at the conclusion of the hearing, the learned Registrar gave judgment for the sum claimed together with interest and costs. Against that decision this appeal was brought and at the conclusion of the hearing I dismissed the appeal with costs.

Mr. Wu on behalf of the defendants raised several defences, which may be summarized as follows:

(i) The statement of claim suffers from a grave or serious defect: there is no averment therein of how the amount alleged to be due to the plaintiffs was incurred. The plaintiffs have failed to identify the debt alleged to be due under the agreement, and therefore have failed to show the basis of the claim against the defendants as the guarantor.

(ii) There was negligence on the part of the banks in issuing the three bank guarantees to the stockbrokers. At the material time, the conditions precedent had not been fully complied with by Freelin and the plaintiffs ought not to have issued the three bank guarantees. In so doing they acted negligently, in respect of which the defendants have a counterclaim against them for damages for negligence.

(iii) At the date of the issue of the writ, only one stockbroker, namely, J. Ballas, had been paid by the banks under the bank guarantee; the

other two stockbrokers, E.G. Tan and Ong & Co., were only paid under their respective bank guarantees after the writ had been issued. In consequence, the claim for the proportionate amounts paid to E.G. Tan and Ong & Co. were premature.

(iv) After the agreement had been entered into, there was a material amendment made on 21 August 1986 whereby, amongst other things, two persons, Tan Chin Nam and Tan Kim Hor, who under the agreement were to be guarantors of a part of the amount due or owing by Freelin, were substituted by Loy Hean Hiong and Chen Lip Keong, and this amendment has materially and adversely affected the position of the defendants under the guarantee.

I now deal with each of the defences *seriatim*. On the first defence, I am unable to agree that the statement of claim suffers from any grave or serious defect. The essential averments are present. The agreement and the guarantee, the material terms thereof have been pleaded; it has also been pleaded that a sum of $13,710,600 was due to the banks from Freelin under the agreement and that Freelin had failed to pay the amount. Essentially, the claim against the defendants is under the guarantee for $2,434,519.38 representing 22.73% of the total owing by Freelin to the second, third, fourth, fifth and sixth plaintiffs, which is the sum of $13,710,600 minus the amount owing by Freelin to Oversea-Chinese Banking Corporation Limited. It may be that the statement of claim lacks certain particulars, but in my view, it does not suffer from any grave or serious defect.

The main complaint in the second defence is that the plaintiffs had failed to ensure that condition 17 of the conditions precedent listed in schedule 4 to the agreement had been complied with before they issued their bank guarantees to the stockbrokers and were therefore negligent. Under condition 17, the first plaintiff as the agent for the banks was to receive:

"Evidence satisfactory to the agent [the first plaintiff] and the majority banks that the option securities will be re-quoted on the official list of each of the Stock Exchange of Singapore Limited and The Kuala Lumpur Stock Exchange within three months of the date of this agreement."

In connection with this condition it was not in dispute that at the material time when the agreement and the guarantee were executed, quotations of and dealings in the option securities on The Kuala Lumpur Stock Exchange and The Singapore Stock Exchange Limited were suspended, and after the execution of the agreement and the guarantee such suspensions had not been lifted and indeed even up to this date have not been lifted. Before the issue of the bank guarantees by the banks the first plaintiff had received, in so far as material to condition 17, the following:

(a) copies of letters from The Stock Exchange of Singapore Limited written to Supreme and Grand United requesting for certain information and documents to be furnished by them respectively;

(b) copies of letters from The Kuala Lumpur Stock Exchange stating that the committee of the exchange had resolved to lift the suspension on the trading of the option securities subject to the respective companies furnishing certain information and documents; and

(c) letters from Supreme and Grand United respectively each stating the following:

"Further to our telecom. This is to confirm that on present indications the items asked for by KLSE in its letter of 19 July 1986 are expected by the company to be able to be complied with in the near future."

It was stated by Chee Kow Chai, a director of the first plaintiff, in his affidavit affirmed on 16 March 1987, that the first plaintiff and the banks were satisfied with these documents so far as condition 17 was concerned. In my view, on the basis of very clear and unambiguous words used in condition 17 the question whether these documents constituted satisfactory evidence is a matter for the first plaintiff and the banks to decide at the material time, and at that time they found the documents satisfactory for the purpose of the condition. This is sufficient to dispose of the second defence raised by the defendants. There is, however, yet a stronger argument against it. It was submitted on behalf of the plaintiffs, and I agree, that the conditions precedent, including condition 17, were provided in the agreement for the benefit of the banks and they were entitled to waive, if they so wished, compliance with all or any of the conditions. The guarantee expressly made provisions under which the plaintiffs may waive compliance with any term by Freelin or grant other indulgence to Freelin: see clause 3(A) of the guarantee. Further, even the delisting or the continued suspension of the quotations of the option securities on the two stock exchanges was expressly provided for in clause 3(A), which is as follows:

"3(a). As between the guarantor and the agent and the banks, the guarantor shall be liable under this guarantee as if it were the sole principal debtor, and not merely a surety, for the guaranteed amounts. Accordingly, it shall not be discharged, nor shall its liability be affected, by anything which would not discharge it or affect its liability if it were the sole principal debtor (including (i) any time, indulgence, waiver or consent at any time given to the purchaser or any other person, (ii) any amendment to any provision of the agreement, any security document or any other security or other guarantee or indemnity, (iii) the making or absence of any demand on the purchaser or any other person for payment, (iv) the enforcement or absence of enforcement of the agreement, any security document or any other security or other guarantee or indemnity, (v) the release of any security, guarantee or indemnity, (vi) the insolvency, winding-up, amalgamation, reconstruction or reorganization of the purchaser, Grand United Holdings Berhad, Supreme Corporation Berhad or any other person (or the commencement of any of the foregoing), (vii) the illegality, invalidity or unenforceability of or any defect in any provision of the agreement, any security document or any other security or other guarantee, indemnity or any of the obligations of the purchaser or any other party thereunder or (viii) the delisting of the option securities from or the suspension of the quotation of the option securities on the official list of the Stock Exchange of Singapore Limited or The Kuala Lumpur Stock Exchange)."

It is also significant that under clause 16(A) of the agreement one of the events which the first plaintiff is entitled to declare as an event of default is the following, *i.e.* if "any of the option securities (a) is not re-quoted on the official list of each of The Stock Exchange of Singapore Limited and The Kuala Lumpur Stock Exchange within three months of the date of this agreement".

In considering this defence it is also helpful to look at "the factual matrix of the background" against which the agreement and the guarantee were executed, and in this connection I need only to refer to the following paragraph of the affidavit of Tan Sri Khoo Teck Puat, a director of the defendants, affirmed on 14 May 1987, which is as follows:

"4. I was aware that TKS was involved in the demise of the Pan-Electric Group and he had publicly assumed liability for Pan-Electric Industries forward contracts for the purchase of shares worth about $100 million. I was told by WAP that there were three stockbroking companies comprising Ong and Company (Pte.) Ltd. (Ongco), EG Tan and Company Pte. (in liquidation) (EG) and J. Ballas & Company (Pte.) Ltd. (Ballas) which are involved in such contracts with TKS. The bulk of these shares are in Supreme Corporation Berhad (SCB) and Grand United Holdings Berhad (GUH) and as far as I am aware, many of the said contracts matured at the end of June 1986 or before and nothing had been paid by TKS before the defendants' guarantee was executed on 4 August 1986. At that time and up till the present, the SCB and GUH shares have been suspended by the Stock Exchange of Singapore Ltd (SES) and The Kuala Lumpur Stock Exchange (KLSE). The plaintiffs had worked out a rescue plan for and with TKS which included the formation of a private exempt company limited by shares called Freelin Investment Pte Ltd (Freelin) with a paid-up capital of $2.00. The company was to be used as a vehicle so as to enable TKS to meet his obligations and to use the plaintiffs' credit facilities to finance Freelin's purchase of these shares from the three said stockbroking companies."

Accordingly, if one looks at the factual matrix of the background, it is clear that Freelin was, and is, a $2 company formed by TKS to acquire the option securities from the stockbrokers. The quotations of and dealings in such securities were suspended on the two stock exchanges. TKS himself was then facing a criminal prosecution and it must have dawned on everyone concerned in these transactions, including the defendants, that in the event of his conviction, he might be sentenced to a term of imprisonment, and that in that event the chances of the suspension of the quotations of and dealings in the option securities on the two stock exchanges being lifted would be extremely remote, and Freelin defaulting under the agreement would be extremely imminent. Further, it must also have been clear to everyone concerned, including Tan Sri Khoo, that whatever "rescue plan" the banks had worked out for TKS in financing the acquisition by Freelin of the option securities they would require financial protection from persons to whom they would look for payment in the event of a default by Freelin. Plainly, all the parties concerned, including the defendants, must have contemplated at the material time the strong likelihood of the continued suspension of the quotations of and dealings in the option securities on the two stock exchanges. Hence, specific provision against the non-lifting of the suspension of the quotations of and dealings in the option securities on both the stock exchanges was made both in the agreement and the guarantee.

On the material before me I can find no basis on which the defendants can truly maintain that there was any negligence on the part of the plaintiffs or any of them in failing to ensure that Freelin had complied with condition 17 prior to their issue of the bank guarantees to the stockbrokers.

The third defence relates to the quantum of the amount claimed. It is common ground that prior to the commencement of this action the banks had only paid to J. Ballas the amount due under the bank guarantee issued to the latter and that payments to the other stockbrokers, Ong & Co. and

E.G. Tan, pursuant to their respective bank guarantees, were made after the commencement of the action. Notwithstanding these two belated payments, in my opinion, the claim for the proportionate amount of these two payments which was included in the statement of claim was not premature, and my reasons are these. Under the agreement the banks issued to the stockbrokers the bank guarantees, and upon such guarantees being issued the liabilities of Freelin to indemnify the banks arose: see clause 5(A) of the agreement. The defendants had guaranteed to the second, third, fourth, fifth and sixth plaintiffs the punctual payment by Freelin of the guaranteed amounts and similarly their liabilities to these plaintiffs also arose. At that stage their liabilities were merely contingent. But subsequent events crystallized them into liquidated amounts. First, on 26 August 1986, TKS was convicted of a criminal offence and was fined and sentenced to a term of imprisonment. Secondly, in September 1986, the various guarantors, including the defendants, gave notices to the first plaintiff stating that they terminated their respective guarantees and that they would not be liable for any sum thereafter incurred. By reason of these events, the first plaintiff was entitled to act under clauses 16(A) and 16(B) of the agreement. These provisions, so far as material, are as follows:

"16(A). *Events of Default:* if at any time and for any reason, whether within or beyond the control of any party to this agreement, any of the following events occurs then, at any time whether or not any such event is continuing the agent may and, if so instructed by the majority banks, shall by notice to the purchaser declare that an event of default has occurred:

...

(x) *Bankruptcy:* any step is taken by any person for the bankruptcy of any personal guarantor or any of the personal guarantors dies or is placed under custody; or

...

(xiii) *Cessation:* this agreement or any of the security documents to which it is a party ceases for any reason (or is claimed by it not) to be the legal and valid obligation of the purchaser, binding upon it in accordance with its terms or any guarantee to which it or he is a party ceases for any reason (or is claimed by it or him not) to be the legal and valid obligation of any guarantor, binding upon it or him in accordance with its terms; or

...

(xviii) *Material Adverse Change:* any event occurs or circumstances arise which, in the opinion of the majority banks, give(s) reasonable grounds for believing that the purchaser may not (or may be unable to) perform or comply with any one or more of its obligations under this agreement or any of the security documents to which it is a party or any guarantor may not (or may be unable to) perform or comply with any one or more of its or his obligations under any guarantee to which it or he is a party.

(B) *Cancellation/Acceleration:* at any time after making a declaration under sub-clause (A) above and whether or not any event mentioned in that sub-clause is continuing the agent may and, if so instructed by the majority banks, shall by notice to the purchaser declare:

(i) the facilities to be cancelled, whereupon they shall be cancelled; and or

(ii) ...

(iii) the purchaser to pay to the agent for credit to the cash collateral account a sum equal to the guarantee outstandings, whereupon such sum shall become so due and payable."

The first plaintiff as agent for the banks did act under these provisions: on 15 October 1986 or thereabout, the first plaintiff through its solicitors declared under clause 16(A) that an event of default had occurred and further made a declaration under clause 16(B) of the agreement. Upon such declarations being made, the facilities were cancelled and "a sum equal to the guarantee outstandings became due and payable". The term "guarantee outstandings" as defined in clause 1(A) of the agreement is as follows:

" '*Guarantee Outstandings*' means, at any relevant time in relation to a bank guarantee, the aggregate of the maximum actual and contingent liabilities of the banks at that time under that bank guarantee and, if any payment has been made by a bank under that bank guarantee but not reimbursed by the purchaser in full to that bank, the aggregate of the purchaser's maximum actual and contingent liabilities at that time in connection with that bank guarantee."

In the circumstances that had occurred, as all the three bank guarantees had been issued to the stockbrokers and no payment had been made by Freelin, the total of the guarantee outstandings due to the second, third, fourth, fifth and sixth plaintiffs is $13,710,800 minus the amount due to Oversea-Chinese Banking Corporation Limited, which is not a beneficiary of the guarantee, and from the defendants is due the sum of $2,434,519.38, representing 22.73% of the total amount due to these plaintiffs. This amount was due as at the commencement of the action. The defence of premature claim therefore failed.

Connected with the third defence is a point of construction of the definition of "guaranteed amounts" in the guarantee. It was submitted that on the true construction of the term "guaranteed amounts", the liability of the defendants is 22.73% of all sums due or owing by Freelin from time to

time to the plaintiffs under the agreement and in this case the amount claimed in the statement of claim is not the correct amount because one guarantor, William Cheng, under his guarantee given to the plaintiffs, had admitted liability, and credit should be given of any amount paid by him. I rejected this argument. First, there was no evidence of any payment made by this guarantor. Secondly, the guarantees expressed to be given by the six guarantors under or pursuant to the agreement are so structured that each guarantor under his or its guarantee is liable only for a fixed proportion of the total sum due or owing by Freelin to the second, third, fourth, fifth and sixth plaintiffs. In this case, the proportion fixed under the guarantee is 22.73% "of all sums (whether principal interest, fee or otherwise) whatsoever which are or at any time may be or become due or owing" by Freelin to the plaintiffs, and the time for determining all such sums as due or owing by Freelin was the time when the declarations under clauses 16(A) and 16(B) were made, as in consequence of those declarations Freelin became liable to pay the amount due to the banks.

I now come to the fourth defence which, in my view, equally has no merit. It was admitted by the plaintiffs that after the execution of the agreement and the guarantee, a supplemental agreement was made amending the agreement. Under the supplemental agreement, two of the proposed guarantors, Tan Chin Nam and Tan Kin Hor, named in the agreement were substituted by Loy Hean Hiong and Chen Lip Keong. Such amendment does not in any way affect the position of the defendants under the guarantee. The amount guaranteed by the defendants is entirely a different sum from the amounts which under the agreement were to be guaranteed by Tan Chin Nam and Tan Kin Hor and which eventually were guaranteed by Loy Hean Hiong and Chen Lip Keong. There is no question of the defendants claiming any contribution against the two guarantors. In any event, the terms of the guarantee permit the parties to vary the agreement: see clause 3(A) of the guarantee.

For these reasons, I have come to the conclusion that none of the defences raised on behalf of the defendants constitute a triable issue.

*Order accordingly.*

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

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## BRUNEI REPORTS

### AHMAD BIN HAJI BAKAR v. PUBLIC PROSECUTOR

[A.Cr.J. (Roberts C.J.) 9 February 1988]

[Bandar Seri Begawan – Criminal Appeal No. 13 of 1987]

*Criminal Procedure – Sentences – Appeal against – Merits of application – Public interest.*

The appellant pleaded guilty to two charges. The two charges were for offences against section 6(1) of the Immigration Act (Cap. 17) ("the Act"). For one of the offences, the sentence was six months' imprisonment and for the other the sentence was three years' imprisonment. The sentences were ordered to run concurrently.

The appellant appealed against the sentences.

**Held,** dismissing the appeal: public interest requires that a sentence of imprisonment sufficient to deter not only the accused but other persons of a like mind shall be imposed in cases of this kind.

*Case referred to:*

(1) *Taib bin Gemok* v. *Public Prosecutor* [1984] 1 M.L.J. 313 (refd).

CRIMINAL APPEAL.

*Mohamed Daud* for the appellant.

*Ahmad Isa* (Deputy Public Prosecutor) for the State.

*Cur. Adv. Vult.*

**Roberts C.J.**: I am satisfied that this appeal against sentence ought to be dismissed. The appellant pleaded guilty in the magistrate's court to two charges.

The first charge was for an offence against section 6(1) of the Immigration Act (Cap. 17), punishable under section 58. Section 58 is a general section which provides that a person guilty of an offence under the Act, for which no special penalty is provided, shall be liable on conviction to a fine of $2,000 and imprisonment for six months.

The second charge is also for an offence contrary to section 6(1) of the Immigration Act, and is punishable under section 55(1) of the Act. For this offence a penalty is provided of not less than one year nor more than seven years' imprisonment or a fine not exceeding $20,000 and a whipping. The magistrate imposed a sentence of three years' imprisonment on this charge, to run concurrently